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SUPREME COURT, U.S.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1985

ANTHONY GRANDISON, SR.,

Petitioner

v.

STATE OF MARYLAND,

Respondent

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF MARYLAND

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QUESTIONS PRESENTED

1. Whether Petitioner's waiver of counsel extended through sentencing?

2. Whether the trial court abused its discretion in denying Petitioner's request to speak to Rodney Kelly alone?

3. Whether the Maryland Court of Appeals has consistently interpreted the Maryland Death Penalty Statute so as to avoid offending the Eighth and Fourteenth Amendments to the Federal Constitution?

4. Whether the Maryland Capital Sentencing Statute and the trial proceedings adequately allowed the jury to show compassion and mercy?

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BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF MARYLAND

The State of Maryland, Respondent, by its attorneys, Stephen H. Sachs, Attorney General of Maryland, and Deborah K. Chasanow, Assistant Attorney General, requests that the Petition for Writ of Certiorari to the Court of Appeals of Maryland be denied.

STATEMENT OF THE CASE

The Court of Appeals' decision was filed on April 1, 1986. Petitioner recently filed a Motion for Reconsideration in that Court on June 20, 1986, along with a request for permission to file it more than 30 days after the original

opinion. It was denied by the Court of Appeals for want of jurisdiction on July 9, 1986.

With that addition, Respondent accepts Petitioner's Statement of the Case as outlining the salient events in this prosecution. Some portions of Petitioner's Statement of Facts, however, are inaccurate and misleading and Respondent is unable to accept it in its entirety.

STATEMENT OF FACTS

Scott Piechowicz and Susan Kennedy were shot to death on April 28, 1983, as they worked at the Warren House Motor Hotel in Baltimore County, Maryland. Petitioner was convicted of orchestrating their murders from the Baltimore City Jail, by hiring Vernon Evans to kill them in return for $9,000.00, by arranging for Rodney Kelly to provide the weapon, and by directing Janet Moore to facilitate their efforts.

Petitioner was in City Jail awaiting trial on federal charges in the spring of 1983. Scott Piechowicz and his wife Cheryl were to be witnesses in that case. On March 11 and 14, 1983, a suppression hearing was held in federal court on Petitioner's motion to exclude their identifications of him. Both Scott and Cheryl testified. Janet Moore, Petitioner's common-law wife, was there and spoke to Cheryl.

On March 14, Petitioner wrote to Janet Moore, telling her about his trial preparation and stating:

> "I might have you take a friend of mine, name Short, over there to see one of the kids, probably Rodney or Mike, because I want him to take care of something to be on the safe side."

The motion to suppress was denied on April 22, 1983 and an order was mailed to all parties. Trial was scheduled to commence at the beginning of May. The State's evidence of the ensuing events was presented through the testimony of Charlene Sparrow (Evans' girlfriend), Calvin Harper (who accompanied Rodney Kelly when he showed the murder weapon to Evans), and Theresa Purdie (the mother of Petitioner's son).

On April 26, 1983, Petitioner called Evans on the telephone and, at Petitioner's request, Evans went to City Jail with Janet Moore to visit him. Evans, Moore, and Sparrow then went to find Rodney Kelly. They met at Purdie's apartment where Petitioner spoke to them on the phone. The conversation included discussion about protective glass at a motel.[1]

Moore, Evans, and Sparrow then went to the Warren House, where Sparrow unsuccessfully sought to rent a room. She did make a reservation for April 27 and she and Evans stayed at the motel the night of April 27.

On the afternoon of April 27, Kelly showed Evans a gun that he would use. After Evans ascertained that a white couple was on duty on the morning of April 28 and spoke to Moore, Sparrow rented the room for another day. She and Evans left the motel. Kelly brought the weapon to Evans.

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1 Theresa Purdie told them that Petitioner said for Kelly to give her some money.

Evans entered the motel and, when he came running to the car where Sparrow was waiting, the gun was smoking.[2] Kelly retrieved the gun that evening and gave Evans $500.00. Evans looked for Kelly early in May, and received another $1,000.00 from him on May 2, 1983.

The victims of the shooting were Scott Piechowicz and his sister-in-law Susan Kennedy. Susan had taken her sister Cheryl's place at work that day.

Waiver of Counsel

Petitioner was not represented by counsel in the trial court. From the arraignment on July 19, 1983, Petitioner insisted on representing himself. Both Judge Fader in Baltimore County and Judge Simpkins in Somerset County thoroughly explained the right to counsel and the dangers of self-representation. The matter was discussed on July 19, 1983, September 7, 1983, November 9, 1983, November 23, 1983, and February 3, 1984. More than two and one-half months before trial, Judge Simpkins explained to Petitioner that a death penalty case involved a bifurcated procedure, with trial followed by sentencing. He made clear that the right to an attorney that Petitioner was waiving included having someone help with mitigation of sentence and in preparing for sentencing. Petitioner chose self-representation, but claimed the right to appointment of "standby" counsel to assist him.

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[2] Evans, who had earlier said he was going to kill someone at the motel, admitted to Sparrow that he had shot the victims "from the waist up." He told her he was to get $9,000.00 for killing them.

After many discussions including the parties and the Public Defender, Judge Fader originally denied Petitioner's request. After removal, however, Judge Simpkins did appoint an attorney as standby counsel. Despite the presence of standby counsel, however, Petitioner conducted his case from jury selection to argument. Any participation by the attorney was clearly done only with Petitioner's consent.

On May 28, 1984, the first date scheduled for sentencing, Petitioner informed the trial judge that he and standby counsel had agreed to have standby counsel "handle" sentencing. He claimed a "right" under Faretta v. California, 422 U.S. 806 (1975), to terminate self-representation whenever he wished. The trial judge thought the matter was discretionary with the court. Although asserting a right to counsel, all that Petitioner wanted was additional time for standby counsel to prepare. They asked for an additional week and were granted an eight day postponement. In that sense, Petitioner obtained all the relief he requested. Sentencing proceeded with counsel acting in a standby role and not as representing Petitioner.

Interview with Rodney Kelly

Despite having been with Rodney Kelly throughout the federal trial charging civil rights violations arising from this killing, Petitioner wanted to meet with Kelly alone to interview him prior to putting him on the witness stand. Because of the security arrangements for Kelly, who was serving a life sentence plus 50 years for his part in the

murders and was charged with another murder while in prison in Lewisburg, the trial court refused to let them "get together and discuss matters." Petitioner had been warned that self-representation would be difficult because of his incarceration and was told that standby counsel was available to act as a go-between.

Unfettered Exercise of Mercy

Petitioner has maintained from the beginning of the proceedings that the jurors could arbitrarily return a sentence of life imprisonment even if their findings and the weighing of circumstances led to return of a death sentence. In line with that, he objected at times when potential jurors were asked if they would/could follow the law. He also requested instructions that essentially told the jury that it could ignore the part of the law setting forth the balancing process and the part requiring the articulation of mitigating factors. Nowhere at trial did he base his view on Maryland Rule 759(f) (current 4-327(e).) Rather the instruction requests rested on out-of-state authority and Justice Stevens' individual opinion respecting the denial of certiorari in Smith, Williams, and Pinch v. North Carolina, 459 U.S. 1056 (1982).

ARGUMENT

I.

PETITIONER'S WAIVER OF HIS SIXTH AMENDMENT RIGHT TO THE ASSISTANCE OF COUNSEL EXTENDED THROUGH SENTENCING.

Petitioner does not complain, as indeed he could not, that his waiver of counsel was ineffective. His claim is simply that he could terminate that waiver unilaterally and insist on counsel for sentencing. Petitioner, however, is wrong in viewing the sentencing proceeding as a new "case" for right to counsel purposes. Once self-representation was properly elected, Petitioner could legitimately be held to it. This Court clearly conceives of sentencing as a stage of a criminal proceeding at which counsel is guaranteed, Mempa v. Rhay, 389 U.S. 128, 134 (1967), and not a new case. In Mempa, Justice Marshall commented: "We assume that counsel appointed for the purpose of the trial or guilty plea would not be unduly burdened by being requested to follow through at the deferred sentencing state of the proceeding." 389 U.S. at 137. The recent decision in Lockhart v. McCree, 476 U.S. ___, 106 S.Ct. ___, 90 L.Ed.2d 137, 153 (1986), similarly refers to "the guilt and penalty phases of a capital trial." It follows that a defendant who elects self-representation for a case has made an election for all stages of the proceeding.

A pro se defendant has no right to "hybrid" representation and:

> "A defendant does not have a constitutional right to choreograph special appearances by counsel." McKaskle v. Wiggins, ___ U.S. ___, 104 S.Ct. 944, 953-54, 79 L.Ed.2d 122 (1984).

The defendant Wiggins had a b.furcated trial and elected a jury for "the punishment phase." The court commented that he proceeded pro se at that "stage" as well, ___ U.S. at ___, 104 S.Ct. at 950, 79 L.Ed.2d at 131-32. Sentencing is obviously part of the same case initiated by the indictment and not a separate case for counsel purposes.

Many courts have examined the issue and concluded - categorically - that there is no right to counsel and to proceed pro se; United States v. Halbert, 640 F.2d 1000, 1009 (9th Cir. 1981) (the two rights are disjunctive, citing cases from the Second, Fourth, Fifth, and Ninth Circuits); United States v. Trapnell, 638 F.2d 1016, 1027 (7th Cir. 1980); United States v. Crowhurst, 629 F.2d 1297, 1301 (9th Cir. 1980). The appointment of standby counsel was entirely discretionary with the trial court and not based on any right of Petitioner. Had there been no standby appointed, no question would have arisen at sentencing, because there would have been no one available to participate in the continuation of the case. Standby counsel is appointed primarily to assist the court in conducting trial and to be available to take over a defense should a defendant's right to continued self-representation be forfeited by disruptive conduct. Nothing suggests that a defendant has the unfettered right to elect representation by counsel once a valid waiver of counsel has been made.

The presence of standby counsel, at Petitioner's express request, was more than the Constitution required. He had no

right to terminate self-representation at will, or to switch back and forth. He made his decision voluntarily and knowingly - and insistently - at the beginning of trial. The waiver of counsel extended through imposition of sentence.

II.

THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN DENYING PETITIONER'S REQUEST TO SPEAK TO RODNEY KELLY ALONE.

The Court of Appeals of Maryland upheld the trial court's discretionary decision not to allow a private, personal interview between Petitioner and Rodney Kelly on several grounds. First, it found the concern over security to be legitimate. Second, it found no prejudice to Petitioner from the condition that the interview be conducted through standby counsel, particularly in light of the fact that the two had ample opportunity to confer during the federal trial. Finally, it found that the absence of a proffer of Kelly's testimony precluded a finding of prejudice (Pet. App. 44-45).

Petitioner's attempt to turn a proper discretionary ruling into a denial of the right to proceed pro se is unavailing. Warned of the dangers of self-representation, Petitioner assumed the risk that his incarceration would interfere with his desires for presenting his case. Having failed to show why standby counsel could not even attempt the interview on Petitioner's behalf, Petitioner has failed to establish an abuse of discretion.

III.

THE ALLOCATION OF THE BURDEN OF PERSUASION UNDER THE MARYLAND CAPITAL SENTENCING STATUTE IS CONSTITUTIONAL.

Petitioner here essentially restates arguments made recently in Petitions for Writ of Certiorari by three other defendants sentenced to death in Maryland: Foster v. Maryland, No. 85-6650, Evans v. State, No. 85-6649, both cert. denied, June 30, 1986, and Huffington v. State, No. 85-6648, cert. denied, July 7, 1986.

Petitioner contends that the interpretation of Maryland's capital sentencing statute by the Maryland Court of Appeals in Foster v. State, 304 Md. 439, 499 A.2d 1236 (1985), violated both the Eighth and Fourteenth Amendments to the Federal Constitution. In support of these claims, Petitioner contends that the Maryland Court of Appeals' decision in Foster constituted a "reconstruction" of the statute which varied the burden of persuasion from that actually employed in his case. He contends that the procedure employed here placed the ultimate burden of persuasion upon him with regard to obtaining a life sentence, instead of death. However, a review of the Maryland Court of Appeals opinion in Foster, together with prior decisions interpreting Art. 27, §413 of the Maryland Annotated Code, reflects that the Foster opinion did not change the law. Rather, the opinion restated that which had been pronounced in Tichnell v. State, 287 Md. 695, 730, 415 A.2d 830 (1980), the first decision rendered by the Court of Appeals under the current death penalty statute. As

the law never changed, there was no unconstitutional vagueness, arbitrariness or capriciousness, or improper allocation of burden in Petitioner's case. As a result, review is unwarranted.

In Tichnell v. State, 287 Md. at 730, 415 A.2d at 849, the Maryland Court of Appeals stated:

> "Because the State is attempting to establish that the imposition of the death penalty is an appropriate sentence, the statute places the risk of nonpersuasion on the prosecution with respect to whether the aggravating factors outweigh the mitigating factors."

This holding was reiterated by the court in Trimble v. State, 300 Md. 387, 415 n.16, 478 A.2d 1143, 1157 n.16 (1984), cert. denied, ____ U.S. ____, 105 S.Ct. 1231, 84 L.Ed.2d 368 (1985), where it stated:

> "In Tichnell I, we also construed Section 413(h)(2), which provides that the trier of fact shall determine whether 'the mitigating circumstances outweigh the aggravating circumstances,' to place the burden of persuasion on the prosecution."

The holding of the Court of Appeals in Foster v. State, supra, did not constitute a deviation from this previously announced law. Rather, the Court merely reiterated that when evidence is weighed, no burden is imposed upon either party. In this ultimate balancing, if the aggravating factors outweigh the mitigating factors the sentence is death; if the mitigating factors outweigh the aggravating factors, the sentence is life; if the mitigating factors and aggravating factors are in a state of even balance, the appropriate sentence is life because the State (as the moving party) bears

the risk of nonpersuasion.[3] As there was no deviation from existing law, the Maryland Capital Punishment Statute is not overly vague in contravention of the Fourteenth Amendment, and does not result in the arbitrary and capricious imposition of sentence in violation of the Eighth Amendment.[4] There is simply nothing in the reiteration of prior holdings in the Foster opinion that would serve to violate the Federal Constitution.

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[3] In support of his contention under the Fourteenth Amendment, Petitioner cites Ashton v. Kentucky, 384 U.S. 195 (1966), and Hicks v. Oklahoma, 447 U.S. 343 (1980), for the proposition that a limiting construction cannot be applied to affirm the decision in the case in which the limitation was announced. The flaw in Petitioner's contention, aside from the fact that there was no reconstruction here, however, is that the Ashton restriction applies only where the new interpretation saves that which would have been unconstitutional. Assuming that the Foster decision transferred the burden of persuasion to the State, there remains no infirmity since imposing the burden on the defendant is not unconstitutional. See Proffitt v. Florida, 428 U.S. 242 (1976) (scheme in which death is presumed after one or more aggravating circumstances is found unless overridden by mitigating factors constitutional). Cf. Patterson v. New York, 432 U.S. 197 (1977).

[4] Petitioner's reliance upon Bouie v. City of Columbia, 378 U.S. 347 (1964), in asserting that at the time he was sentenced (prior to Foster) the statute was unconstitutionally vague is misplaced. In Bouie, the South Carolina appellate court expanded the definition of the trespass statute beyond its specific terms in order to find the evidence sufficient in Bouie's case. Here, on the other hand, the judicial interpretation was not contrary to the legislative enactment. See Stebbing v. Maryland, ___ U.S. ___, 105 S.Ct. 276, 280, 83 L.Ed.2d 212, 217 (1984) (Marshall, J., dissenting on denial of certiorari) (Maryland statute is silent as to burden on ultimate weighing). Moreover, the South Carolina courts had never interpreted the trespass statute to include Bouie's conduct until after Bouie's arrest. The Maryland Court of Appeals, on the other hand, had interpreted the statute with respect to burdens prior to Petitioner's trial.

Petitioner additionally contends that review of his case is warranted because he was tried under the interpretation of the law that existed prior to the Foster decision, an interpretation that he alleges is unconstitutional. However, as noted above, Foster did not initiate any change in the law. It was the law from the time of the first decision under the existing statute. As a result, his contention on this basis must be rejected.

He further asserts that even if the burden were properly allocated to the State, the statute is nevertheless unconstitutional because the ultimate weighing does not require a finding "beyond a reasonable doubt." However, Petitioner once again erroneously talks in terms of burden with respect to a weighing of one set of circumstances against another. As noted by the Maryland Court of Appeals, "ordinarily in such a balancing process, a court simply determines which side outweighs the other, without being concerned with how much or how clearly one side may outweigh the other." Foster v. State, 304 Md. at 477. The Court of Appeals had earlier rejected an identical contention in Tichnell v. State, 287 Md. at 732-733, 415 A.2d at 849-850, relying upon this Court's decision in Patterson v. New York, 432 U.S. 197 (1977). In Patterson, this Court

> "decline[d] to adopt as a constitutional imperative, operative country wide, that a state must disprove beyond a reasonable doubt every fact constituting any and all affirmative defenses related to the culpability of an accused. Traditionally, due process has required that only the most basic procedural safeguards be observed;

> more subtle balancing of society's interests against those of the accused have been left to the legislative branch." 432 U.S. at 209-10.

Under the Maryland scheme, the State is required to prove beyond a reasonable doubt that the defendant is guilty of first degree murder, that he or she was a principal in the first degree or contracted for the murder of another, and that at least one aggravating factor is present. The defendant is then provided an opportunity to present evidence to help the jury find the existence of any mitigating factor established by a preponderance of the evidence.[5] It is then up to the sentencer to weigh the evidence in aggravation against the mitigating factors found to exist under a preponderance standard in order to determine the ultimate sentence. There is no unconstitutional allocation of burden or standard in this scheme. As a result, review of Petitioner's case is unwarranted.

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[5] The defendant has no obligation to produce evidence or prove mitigating factors. As stated in Foster, 304 Md. at 474, 499 A.2d at 1254: "[R]egardless of what evidence a defendant himself may or may not produce, or regardless of any mitigation argument he may or may not advance, if the jury perceives from the case a fact or circumstance concerning the crime or the defendant, which the jury deems to be mitigating, it may treat it as such. As to mitigation, it is only the risk of non-production or non-persuasion which the defendant bears."

IV.

THE MARYLAND CAPITAL SENTENCING STATUTE AND THE TRIAL PROCEEDINGS IN THIS CASE ADEQUATELY ALLOWED THE JURY TO SHOW COMPASSION AND MERCY, HAD IT BEEN SO INCLINED.

Petitioner's broad attack on Maryland procedures as precluding the exercise of mercy is seriously overstated. Not only does the law allow the exercise of mercy, but the precise instruction requested by Petitioner would have allowed the jurors to exercise their own "moral, factual and legal judgment in determining whether that [aggravating] circumstance is sufficient in [their] minds to call for the punishment of death."

The Court recently granted review in California v. Brown, No. 85-1563, where the California Supreme Court invalidated the use of an antisympathy instruction, at least where other standard instructions focused only on the crime, and did not include the defendant's background and character, as possible mitigating circumstances. People v. Brown, 709 P.2d 440, 453 (Cal. 1986) (en banc). Here, there was no antisympathy instruction given and the jury was told that it could consider anything about the crime or the defendant to be a mitigating circumstance. Petitioner's complaint is that the jury should have been told that it was free to extend mercy without stating why. He asks for too much. As the Court of Appeals said:

> "[I]t strikes us that indeed there is ample provision for the jury to show compassion or mercy, albeit based on articulated facts." App. 52.

CONCLUSION

For the foregoing reasons, Respondent respectfully requests that the Petition for Writ of Certiorari filed herein be denied, review being neither desirable nor in the public interest.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 15th day of July, 1986, the Brief in Opposition to the Petition for Writ of Certiorari was mailed to the court and copies thereof were mailed, postage prepaid, to Nancy L. Cook, Esquire, The American University, Cassell Annex, 4400 Massachusetts Avenue, N.W., Washington, D.C. 20016.

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